International Brotherhood of Electrical Workers, Local 126 *and* Henkels & McCoy, Inc. Case 4–CD–1062

September 16, 2002

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act (the Act). The charge in this proceeding was filed on May 16, 2001,[1] by Henkels & McCoy, Inc. (the Employer), alleging that the Respondent, International Brotherhood of Electrical Workers, Local 126 (IBEW Local 126), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by the Laborers' International Union of North America, Local 413 (Laborers Local 413) and the International Union of Operating Engineers, Local 542 (IUOE Local 542). The hearing was held on August 15 and 16, 2001, before Hearing Officer Stan P. Simpson. The Employer, Laborers Local 413 and IUOE Local 542 have filed posthearing briefs.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, a Pennsylvania corporation, with its principal place of business in Blue Bell, Pennsylvania, is engaged in the performance of construction services throughout the United States. It annually provides services valued in excess of $50,000 directly to customers located outside Pennsylvania. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. We further find, based on the stipulation of the parties, that IBEW Local 126, Laborers Local 413, and IUOE Local 542 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

In early March, the Employer began performance of a new contract that it had been awarded by Columbia Transcom (Columbia Project). The contract required the Employer to participate in the construction of a communications network running from the Maryland – Pennsylvania border past Exton, Pennsylvania. Specifically, the Employer's contract called for it to install high-density polyethylene pipe through which it inserted fiber optic cable.

The Employer and the IBEW are parties to a National Teledata Agreement. It applies to all work performed by the Employer involving construction, installation, maintenance, and removal of telecommunications systems or "teledata" work. The scope section in this agreement covers fiber optic installation. Respondent IBEW Local 126 is covered by the National Teledata agreement and has had a long history of representing employees who perform telephone and telecommunications work for the Employer. The Employer assigned the work to its employees who are represented by IBEW Local 126.

Laborers Local 413 has a collective-bargaining agreement with the Employer. The record evidence shows that Laborers Local 413 learned of the work being performed by the Employer on the Columbia Project, and in early February brought up the work assignment with the Employer during a negotiation meeting with representatives of the Laborers District Council. Laborers Local 413's Business Manager, Wade Stevens, informed the Employer's Director of Labor Relations, Steven Friend, that the work being performed was Laborers Local 413's work.

IUOE Local 542 also has a collective-bargaining agreement with the Employer. On March 7, a meeting was held between the Employer and representatives from Laborers Local 413 and IUOE Local 542 to discuss the work being done on the Columbia Project. During that meeting, both Unions informed the Employer that the work belonged to them. The Employer responded that the work was IBEW work and that there would be no reassignment. Subsequently, on May 9, the Employer received copies of notices of demands for arbitration that were filed by the two Unions with the American Arbitration Association, contending that the Employer had violated their respective collective-bargaining agreements by assigning the work to IBEW Local 126.

According to the testimony of the Employer's Labor Relations Director Friend, he contacted IBEW Local 126 President Doug Rapp and informed him of the actions of Laborers Local 413 and IUOE Local 542. Friend told Rapp that some or all of the work possibly could go to those locals as a result of the pending arbitration. Rapp's response included the statement that should a reassignment occur, "a job action would be taken."

[1] All dates are 2001 unless otherwise noted.

On May 15, the Employer received a letter from IBEW Local 126 Business Manager Thomas Leach, which advised that the "Teledata work ha[d] historically been the work of Local Union #126. If not done by Local Union #126, a job action will occur." Later that same day, Leach, in a telephone call with Friend, repeated that some kind of "job action" would be taken to prevent the reassignment of the work from IBEW Local 126. By letter dated May 18, Charles Joyce, IBEW Local 126's counsel, advised the NLRB Regional Director for Region 4 that the reference to "some kind of job action" in IBEW Local 126's letter of May 15, "[was] not to be construed as a threat by Local 126 to engage in picketing or any other activity prohibited by the Act. . . . (and that) the Union is confident that it does not need to engage in any extralegal activity to retain its claim to such work. Instead, Local 126 will exercise all legal remedies available to it, both under its collective-bargaining agreement with Henkels & McCoy and under the procedures available under the Act, to stake its jurisdictional claim in this case."

At the hearing, Laborers Local 413 and IUOE Local 542 contended: that the notice of hearing should be quashed because there was no jurisdictional dispute for the Board to resolve, based on the lack of evidence of any unlawful coercion on the part of the unions; that IBEW Local 126's statements that it would take "some job action" was not a threat; and that there had not been any picketing by any of the unions.

B. The Work in Dispute

The Board's notice of hearing in this proceeding stated that the dispute concerns the assignment of the following work:

The installation by Henckels & McCoy, Inc. of teledata facilities including fiber optic cable equipment on the Columbia Gas Pipeline right-of-way in Chester County, Pennsylvania.

C. Contentions of the Parties

The Employer contends that the threat by IBEW Local 126 to "take some job action" against the Employer over the disputed work is sufficient basis for the Board to have reasonable cause to believe that Section 8(b)(4) of the Act has been violated. The Employer argues that IBEW Local 126 has not withdrawn its threat, nor has it disclaimed its interest in the disputed work but rather has consistently maintained its desire to continue performing the work in dispute. The Employer asserts that the demands for arbitration filed by Laborers Local 413 and IUOE Local 542 constitute claims for the work in dispute. It observed that the Union Parties stipulated during the hearing that they each claimed the work in dispute.

Based on these facts, the Employer contends that there are competing claims for the work in issue, and that this proceeding is properly before the Board for determination pursuant to Section 10(k) of the Act. The Employer asserts that the work in dispute should be awarded to its employees represented by IBEW Local 126, based on its past practice of assigning the teledata fiber optic work to them.

Laborers Local 413 and IUOE Local 542 contend that the Board should decline jurisdiction in this proceeding because there is no reasonable cause to believe that Section 8(b)(4)(D) has been violated. They assert that there has been no attempt by any of the Unions involved to picket or engage in any conduct proscribed under the Act. They also argue that their filing of grievances and seeking arbitration was not coercive, but merely the exercising of their rights to seek redress by enforcement of their contracts. They also contend that a voluntary method of adjustment exists to resolve the dispute because each Union's collective-bargaining agreement contains a grievance-arbitration clause and that, if IBEW Local 126 would agree to file a grievance, the cases could be consolidated for arbitration. In the alternative, Laborers Local 413 and IUOE Local 542 assert that if the Board does not quash the notice of hearing, the work in dispute should be awarded to employees represented by them because their collective-bargaining agreements mandate the assignment.

D. Applicability of the Statute

Before the Board may proceed with determination of a dispute pursuant to Section 10(k) of the Act, it must be satisfied that: (1) there are competing claims for the work; (2) there is reasonable cause to believe that Section 8(b)(4)(D) has been violated; and (3) the parties have not agreed on a method for the voluntary adjustment of the dispute.[2]

As we discuss below, the following evidence supports our determination that the above requirements of Section 10(k) have been met and that this matter is properly before the Board.

First, we find that there are competing claims for the disputed work. During the hearing, IBEW Local 126, Laborers Local 413, and IUOE Local 542 jointly stipulated to their claims for the work as follows:

> "Local 126, Local 413 and Local 542, all claim the work in dispute that is defined in the Notice of Hearing."

[2] Carpenters Local 275 (Lymo Construction Co.), 334 NLRB No. 67 slip op. at 2 (2001); *Teamsters Local 259 (Globe Newspapers Co.)*, 327 NLRB 619, 622 (1999); *Laborers Local 113 (Super Excavators)*, 327 NLRB 113, 114 (1998).

Further, we find no evidence that IBEW Local 126 ever disclaimed its interest in retaining the work,[3] and the employees represented by it continue to perform the disputed work, which constitutes a "claim."[4]

Second, there is also reasonable cause to believe that Section 8(b)(4)(D) has been violated. The facts above demonstrate that IBEW Local 126 threatened the Employer several times by stating that "a job action would occur" if the Employer reassigned the disputed work to employees represented by Laborers Local 413 and IUOE Local 542. Further, these threats were conveyed both in a letter from IBEW Local 126 Business Manager Leach to the Employer, and orally by Leach and IBEW Local 126 President Rapp to the Labor Relations Director Friend.

The Board has consistently found that threats to take a "job action" provide a reasonable cause to believe that Section 8(b)(4)(D) has been violated. *Laborers Local 435 (Spiniello Construction Co.)*, 323 NLRB 994, 995 (1997); *Iron Workers Local 433 (Crescent Corp.)*, 277 NLRB 670, 673 (1985); *Paper Handlers Local 1 (American Bank Note Co.)*, 255 NLRB 261, 262 (1981).

Contrary to the contentions of Laborers 413 and IUOE Local 542, we do not view the letter sent by IBEW Local 126's counsel to the Regional Director for Region 4 to have disavowed the local's threats to engage in some type of proscribed conduct in order to retain the work in dispute. In that letter, counsel wrote that IBEW Local Business Manager Leach's statements concerning a "job action" contained in his May 15 letter to the Employer "[was] not to be construed as a threat," but the letter made no reference to the oral statements made by both Leach and President Rapp regarding a job action. At best, counsel's letter is merely an advocate's attempt to address the legal issue before this Board as to whether statements concerning a "job action" provide a reasonable cause to believe that Section 8(b)(4)(D) has been violated. In this light, IBEW Local 126 counsel's statement in the letter that "the Union is confident that it does not need to engage in any extralegal activity" bears more heavily on whether the threat of a job action will need to be exercised, not that this prospect is being disavowed or repudiated. We find no merit in this contention that no reasonable cause exist to believe that Section 8(b)(4) has been violated.

[3] IBEW Local 126 counsel's May 18 letter is not inconsistent with this finding, as the letter made continued reference to that Union's "jurisdictional claim in this case."

[4] See, *Operating Engineers Local 926 (Georgia World Congress Center)*, 254 NLRB 994, 996 (1981) (employees' performance of the work in dispute, even without an express claim to the work, was evidence of a claim).

Finally, we find that the parties have not agreed on a method for the voluntary adjustment of the dispute. Laborers Local 413 and IUOE Local 542 claim that the applicable grievance-arbitration clauses provide for a voluntary method for resolving this dispute, relying on the fact that each union has a grievance-arbitration clause in its individual contract with the Employer. However, none of these procedures bind all three unions and the Employer involved in this proceeding to a single, mutually agreed-upon procedure for the voluntary resolution of the work dispute in this case. Therefore, we find that there is no method for the voluntary adjustment of the dispute to which all parties have agreed. See, e.g., *Carpenters Local 210 (A.F. Underhill, Inc.)*, 323 NLRB 521 (1997).

Accordingly, we conclude that the dispute is properly before the Board for determination.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certifications and collective-bargaining agreements

There is no evidence of any Board certifications concerning the employees involved in this dispute.

As stated above, the Employer and IBEW Local 126 are parties to a collective-bargaining agreement effective from March 1, 2000, to April 30, 2004. In that agreement, the section entitled "Scope" provides, inter alia, that it covers:

> low voltage construction, installation, maintenance and removal of teledata facilities (voice, data and video) including outside plant, telephone and data inside wire interconnect, terminal equipment, central offices, PABX, fiber optic cable and equipment, railroad communications, micro waves, V-SAT, by-pass, CATV, WAN (wide area networks), LAN (local area networks), and ISDN (integrated systems digital network).

Based on this clear and specific language, we find that the work in dispute is covered by the Employer's collective-bargaining agreement with IBEW Local 126. Although the Employer has collective-bargaining agreements with Laborers Locals 413 and IUOE Local 542, neither of their agreements specifically covers all of the

work in dispute.[5] The factor of collective-bargaining agreements accordingly favors an award of the disputed work to employees represented by IBEW Local 126.

2. Area and industry practice

The evidence shows that several contractors in the Philadelphia metropolitan area have used IUOE-represented employees to operate equipment as part of the installation of fiber optic cable networks. The record does not include any evidence regarding whether employees represented by the Laborers have performed the work in dispute. Finally, as detailed below, the Employer's employees represented by the Respondent have been assigned this work on a number of projects in the Philadelphia metropolitan area. There is no evidence regarding general industry practice. As a result, we find that this factor does not favor an award of the work in dispute to the employees represented by any of the unions.

3. Employer preference and past practice

The Employer assigned the disputed work to employees represented by IBEW Local 126 and prefers that the work in dispute continue to be performed by employees represented by IBEW Local 126.

The Employer presented evidence showing that employees represented by IBEW Local 126 have performed the disputed work for the Employer for many years. The Employer also provided evidence showing that the Employer has built communication networks for AT&T, MCI, WorldCom, Quest Communications, and Columbia in Pennsylvania and elsewhere and that its employees represented by IBEW Local 126 have performed all of the teledata communications work in Pennsylvania. Accordingly, we find that the factor of Employer preference and past practice favors an award of the work in dispute to employees represented by IBEW Local 126.

4. Relative skills and training

The evidence is clear that the work in dispute is complex and that the employees represented by IBEW Local 126 have received particularized training to perform their work tasks related to the installation of a telecommunications network that includes the placing and splicing of fiber optic cable. Although Laborers Local 413 and IUOE Local 542 contend that their members can perform the work in dispute and operate the necessary equipment, there is no probative evidence showing that their training is specifically related to the installation of a telecommunications network. Therefore, we find that this factor favors an award of the disputed work to employees represented by IBEW Local 126.

5. Economy and efficiency of operations

The evidence establishes that the Employer's own employees who are represented by IBEW Local 126 have been specifically trained to use all of the necessary equipment and perform all of the necessary tasks associated with the installation of a telecommunications network and are, therefore, familiar with the work in dispute. Laborers Local 413 and IUOE Local 542 are claiming discrete parts of the work in dispute. However, there is no evidence that assignment of parts of the work in dispute to employees represented by Laborers Local 413 and IUOE Local 542 would be as economical and efficient as having the Employer's own employees represented by IBEW Local 126 perform all of the job functions necessary to complete the work in dispute. Accordingly, this factor favors an award of the disputed work to employees represented by IBEW Local 126.

Conclusion

After considering all the relevant factors, we conclude that employees represented by IBEW Local 126 are entitled to perform the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreements, employer preference and past practice, relative skills and training, and economy and efficiency of operations.

In making this determination, we are awarding the work to employees represented by IBEW Local 126, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Henkels & McCoy represented by Local 126 International Brotherhood of Electrical Workers are entitled to perform the installation of teledata facilities including fiber optic equipment on the Columbia Gas Pipeline right-of-way in Chester County, Pennsylvania.

[5] Laborers Local 413's collective-bargaining agreement states that employees represented by it are to be used by the Employer, when, inter alia, "horizontal directional drilling, underground electric and telephone and gas and all excavating and backfilling" is being performed. In this same vein, IUOE Local 542's collective-bargaining agreement refers to, inter alia, "all heavy construction including cross country transmission lines and underground conduit stations and all excavating and backfilling."

Dated, Washington, D.C. September 16, 2002

Wilma B. Liebman, Member

William B. Cowen, Member

Michael J. Bartlett, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD